the resulting adverse environmental impacts without corresponding benefits to water quality, beneficial uses and aquatic life, causes a waiver denial to violate any standard of fairness.

The legislature will be disappointed, I think, to learn that in enacting the water pollution laws, it was allowing a government agency to force secondary treatment on communities regardless of the effect on the quality of the marine receiving waters.

The point is that if primary treatment has no adverse effect on the marine receiving waters as is the case in Port Angeles, then it should be allowed to be discharged and the municipality should not be forced to pay for secondary treatment.

I think the legislature's disappointment will continue unabated when they discover that state law has removed the authority from this Board to make that judgment, on a case-by-case basis.

For these reasons, I believe the law should be changed to allow the quality of the receiving waters to be considered in determining whether a municipal treatment plant discharging to marine waters needs to install secondary treatment.

DATED this 4th day of October, 1985.

10/3/85

LAWRENCE J. FAULK, Chairman

Port Angeles on the basis of the administrative convenience of simply updating the 1977 facilities plan estimates, whereas the City's user-rate analysis was based on more specific estimating techniques, which were supported by professional expertise including that of an investment banker and financial analyst with special expertise in feasibility and financing of sewage treatment projects.

Further, despite the fact that EPA's financial guidelines provide for states to examine the impact of sewage treatment projects to low income users by comparing project costs with the ability of those persons in the bottom quartile of income to pay, DOE did not refute the City testimony regarding the large percentages of the City workforce that is unemployed (15 percent) and the City population that is either senior citizen or single family heads of household (34 percent).

Finally, if DOE is to make judgments like this then they need to be able to correctly estimate the costs of projects such as this by including the following categories of cost; engineering, legal, financial, contingency, overhead, interim interest expense, revenue bond reserve, debt service, revenue bond coverage and sales tax.

III CONCLUSION

Secondary treatment is economically excessive and could cause adverse environmental impacts (sludge disposal) without corresponding benefits. Either of these problems is, in and of itself, sufficient proof of the undue burden of secondary treatment for Port Angeles; combined with the huge economic price tag of secondary treatment and

secondary treatment. This figure exceeds the rate for a "high cost project" under federal guidelines which is $36.79 per month. (Testimony of City expert witnesses John Maxwell.) Yet the testimony before this Board, by the City, is that there is no adverse effect on water quality from the City's discharge without secondary treatment. The Department of Ecology did not consider the water quality of Port Angeles Harbor.

II REASONABLENESS

The Department of Ecology has chosen to define "reasonable" in terms of three criteria: (1) the status of planning needed to proceed to secondary treatment; (2) environmental siting constraints; and (3) economic factors.

The City's appeal focused upon the economic criterion. The Department of Ecology's economic criterion include a variety of concerns, but the basic one was cost. What will the cost of building a secondary treatment plant be? What will the cost of operating a secondary treatment plant be? How will those costs affect the City's sewer rate structure?

It is apparent from the record in this case that the weight of economic testimony is on the side of Port Angeles. This is because it was supported by the testimony of qualified experts as opposed to the Department's witnesses. DOE's witnesses clearly did not have the proper expertise to analyze the subject of user rates, investment banking practices or economic forecasting.

For instance, DOE justified its user-rate analysis for the City of

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. (33 USC 1311(h).

The federal law is clearly a water quality based standard, while the state law is a technology based standard. Until the legislature resolves this matter, this conflict will continue to exist with the attendant results that one sees in this case.

Those results include requiring the City of Port Angeles to issue $14,375,000 of revenue bonds (Exhibit A-11) and pay an estimated monthly residential sewage charge of $41.18 in 1990, to install

that secondary treatment could not improve the quality of Port Angeles' water.

Clearly, in my view, if this Board could have taken into account the quality of the receiving water, secondary treatment would not have been required for the City of Port Angeles.

The federal Clean Water Act provides for a waiver of the secondary treatment requirement for publicly owned treatment plants imposed by subsection 301(b)(1)(B) of the Act where such plants discharge to marine waters.

Federal Clean Water Act 301(h) reads:

> (h) The Administrator, with the concurrence of the State, may issue a permit under section 402 which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant in an existing discharge from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--
>
> > (1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act;
> >
> > (2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;
> >
> > (3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;
> >
> > (4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

LAWRENCE J. FAULK - CONCURRING OPINION

I write separately because even though I reluctantly concur with the result reached by the majority, I wish to emphasize some points not discussed in that opinion.

The result reached by this Board is unfortunate but is required by the law of the state of Washington.

I WATER QUALITY

RCW 90.52.040 reads:

> In the administration of the provisions of chapter 90.48 RCW, the director of the department of ecology shall, regardless of the quality of the water of the state to which wastes are discharged or proposed for discharge, and regardless of the minimum water quality standards established by the director for said waters, require wastes to be provided with all known, available, and reasonable methods of treatment prior to their discharge or entry into waters of the state. (Emphasis added).

This section of the law says clearly that whether the receiving water quality is excellent or very poor makes no difference as to what treatment method is required.

Port Angeles' water has been analyzed by both state and city experts. It has been determined that the quality of the receiving waters is better than the limits described by applicable water quality standards (Class A. Excellent). DOE admitted that the discharge of the City's sewage after primary treatment has nomeasurable effect on water quality. (Stipulation by DOE; Exhibit A-24; Fleskes testimony). The City's expert witnesses, Mr. Gene Suhr, testified

ORDER

The non-concurrence decision of the Department of Ecology announced in its letter to the City of Port Angeles dated June 12, 1984, is affirmed.

DONE this 4th day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD

GAYLE ROTHROCK, Vice Chairman

(See Concurring Opinion)
LAWRENCE J. FAULK, Chairman

WICK DUFFORD, Lawyer Member

of rendering personal views on what the state law ought to be in relation to marine waivers. Our opinion is limited to setting forth what we believe the law of Washington is on the subject. Whether the law should be retained in its present form or changed is a broad question of policy, properly addressed to the Legislature.

XXII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters the following

the source to meet the costs of treatment.

EPA's refusal to consider the second of these propositions in industrial variances was upheld in National Crushed Stone Association, supra. But, underlying this conclusion was the realization that a single plant unable to come up to industry-wide standards can simply cease operations. This is a luxury municipal sewage treatment facilities do not enjoy. The sewage must go some place. Therefore, in interpreting the state law requirement for reasonableness as to municipalities, we think it is appropriate to include the "ability to pay" factor. Cf. Weyerhaeuser v. Southwest Air Pollution Control Authority, 91 Wn.2d 77, 586 P.2d 1163 (1978).

Under the evidence, it is clear that building a secondary treatment facility would be costly for the City and for the citizens served. However, neither significantly greater comparative project costs nor costs beyond the City's ability to bear were shown on the record made to this Board. Borrowing from federal terminology there is nothing "fundamentally different" about the Port Angeles project.

XX

Under the facts of this case, secondary treatment was not shown to fall outside the reasonableness criterion of the State Standard.

Therefore, we hold that DOE was correct in refusing to concur in the City's marine waiver application. Such a waiver would conflict with applicable provisions of state law.

XXI

In reaching our conclusion in this case we disclaim any intention

Actions within exempt categories are exempted from the threshold determination and environmental impact statement requirements of SEPA. Since these procedural requirements, dictating consideration of environmental effects, are waived, we conclude that the action in question cannot violate any substantive force SEPA may have in respect to the merits of the decision.

No SEPA violation having occurred, we are left wth the question of whether the environmental effects of the secondary treatment project violate some other positive law.

The state water pollution control act, chapter 90.48 RCW, is narrowly directed to achieving "the purity of waters of the state." It is not directly concerned with secondary impacts of treatment requirements, such as sludge disposal and increased energy consumption. To the extent matters of this kind may be encompassed in "reasonable methods of treatment," the record before this Board, does not establish the unreasonableness of those secondary impacts which may occur. No other law which the environmental effects of the treatment plant upgrade would violate has been pointed out to us, and we know of none.

XIX

The economic aspect of the reasonableness criterion of the State Standard is, we conclude, defined by two propositions: (1) whether secondary treatment for the source would involve significantly greater costs than for others obliged to obtain the same levels of treatment, and (2) whether secondary treatment is within the economic ability of

imposed by federal law. 33 USC 1311(b)(1)(B), 1311(h). But before federal evaluation of the application, the state must decide that such federal issuance would not conflict with applicable state law. 40 CFR 125.59(b)(3).

If, as here, the state determines that there is a conflict, the federal "waiver" process is aborted, and the state decision, in effect, returns the applicant to the normal discharge permit track. In so doing, the state decision of necessity determines that state law requires at least secondary treatment for discharges from the source in question.

This decision is functionally a part of the state permit issuance process. It is one step in a licensing action which is exempt as a whole. Therefore, it properly falls within the reach of WAC 197-10-170(9)(a). Any effluent limitations imposed on any applicant in the usual course of permit issuance would be exempt from SEPA evaluation. No reason appears why the imposition of such limitations in a step preliminary to such issuance should compel a different result. It is the imposition of the limitations which is the focus of the exemption.

The requirement to achieve effluent limitations based upon secondary treatment equates with requiring effluent limitations established by federal regulations adopted under the federal water pollution statute. DOE has not adopted its own definition of secondary treatment. Instead, it relies on the levels set federally in 40 CFR 133.

adverse environmental impacts of the upgrade project call for rejection of the secondary treatment requirement on substantive grounds.

As to SEPA, we conclude that the action of DOE which is under appeal is categorically exempt by virtue of WAC 197-10-170(9)(a).[1] That subsection exempts:

> The issuance of any waste discharge permit which incorporates without change effluent limitations established by federal regulations adopted under the Federal Water Pollution Control Act [33 USC 1251, et seq.], except for permits authorizing new source discharges.

Normally the level of treatment an entity must meet is imposed through effluent limits set out in a waste discharge permit, issued by the state in satisfaction of both the federal and state law. However, the 301(h) "waiver" process compels a variation in this routine. The "waiver" process involves an application for a federally issued permit allowing a relaxation in the mandate for secondary treatment otherwise

---

1. Chapter 197-10 WAC, since repealed, was in effect in June of 1984 when DOE's decision was made. The waste discharge permit exemption was made more inclusive in the replacement regulations.

   The exemption now extends to:

   > The issuance, reissuance or modification of any waste discharge permit that contains conditions no less stringent than federal effluent limitations and state rules and regulations. This exemption shall apply to existing discharges only and shall not apply to any new source discharges. (Emphasis added.) WAC 197-11-855

   This new version had already been adopted, but was not yet applicable at the time of DOE's decision. WAC 197-11-955.

"compelling evidence." This decisional model is similar to the approach taken by EPA in requiring a showing of "fundamentally different" factors affecting an industrial discharge before allowing it to vary from treatment requirements set on a category-wide basis. See EPA v. National Crushed Stone Association, 449 U.S. 64, 66 L.Ed. 2d 268, 101 S. Ct. 295 (1980).

We conclude that, in this case, the technique of analysis used by DOE is consistent with the state act. There is no quarrel here about the selection of secondary treatment as a matter of engineering judgment. No one argues that the kind of secondary system proposed in the City's facility plan will present extraordinary technical problems to complete and place in operation. The argument is about factors having nothing to do with engineering.

XVII

As to non-engineering factors bearing on reasonableness, DOE considered three: (1) planning status, (2) environmental or siting constraints, and (3) economics. No evidence was presented concerning any impediment to a secondary treatment project by the City caused by its planning status. DOE's reasonableness determination, thus, depends on the "environmental" and the "economics" considerations.

XVIII

Port Angeles' assertion that DOE's decision should be invalidated on the basis of environmental considerations appears to be twofold. They assert that DOE failed to comply with the State Environmental Policy Act (SEPA), chapter 43.21C RCW. In addition, they contend that

In 1983 DOE posed the following question to the Attorney General:

> Under state law may a municipality discharge wastes from its sewerage system into Puget Sound or other marine waters, without providing secondary treatment?

The answer is set forth in AGO 1983 No. 23, a formal opinion construing the State Standard. The core of the response is as follows:

> The precise level of treatment required by those general standards involves, primarily, engineering determinations; i.e., as to what treatment methods are "known," what treatment methods are "available," and what treatment methods are "reasonable" with respect to the particular installation in light of the factual circumstances surrounding it. To make these determinations a review must be conducted by the department of existing engineering technologies in order to enable it to decide which methods of treatment--including but not limited to "secondary treatment" as above defined--are suitable with respect to the waste situation involved in the particular case.

DOE's response was to make a generalized engineering determination, expressed in its municipal strategy document, that secondary treatment is ultimately required of all municipalities by the State Standard. However, it provided for case-by-case evaluation of each municipal discharge to determine if the generalized determination is appropriate for that source at the time the question is asked. Thus, in its denial of concurrence here, DOE stated that secondary treatment is "normally 'reasonable' unless compelling evidence to the contrary is presented."

This approach essentially establishes a generic treatment level as appropriate for the entire class of municipal dischargers and, then, allows for a sort of variance from this level on a showing of

explicitly made applicable in the statute. State Water Control Board v. Train, 559 F.2d 921 (4th cir. 1977).

The Board adopts the same approach in dealing with this question as a matter of state law. Nothing in chapter 90.48 RCW or in any related statutes suggests that the duty to provide the appropriate technology is in any way dependent upon whether federal or state grant or loan assistance will be provided. Nothing suggests that the reasonableness of a particular level of treatment is connected with whether the costs of a project are spread to the taxpayers of the nation or of the state rather than paid solely by the local citizens directly served.

Therefore, we conclude there is no linkage in law between grant fund availability or other forms of financial aid and the level of treatment which may be required. This is the interpretation adopted by DOE in their 1984 "State of Washington Policy and Strategy for Municipal Wastewater Management." As the construction of the responsible agency, this view is given great weight. Pedersen v. Department of Transportation, 25 Wn.App. 781, 6711 P.2d 1293 (1980); Weyerhaeuser v. DOE, 86 Wn.2d 310, 545 P.2d 5 (1976).

XVI

Finally, we turn to subissue (3)--the general question of reasonableness. Since neither water quality nor the availability of grant funds may be considered in the selection of treatment technology, what constitutes reasonableness under the State Standard is a limited inquiry.

However, this does not mean that water quality considerations became relevant to the level of treatment to be imposed when both existing and predicted water quality is better than the polluted level described by water quality standards. The imposition of a technology-based treatment standard under these circumstances is wholly consistent with RCW 90.48.180.

Moreover, under the statutory scheme as a whole, the power to specify conditions is not limited to those "necessary to avoid...pollution." Conditions which will do much better than that are also authorized. Were this not so, RCW 90.52.040 and RCW 90.54.02093)(b) would be meaningless.

XIV

The conclusion we reach on the water quality issue, as a matter of state law, is consistent with decisions concerning treatment requirements of the federal act. Except where water quality considerations may have been made expressly applicable by the statute, they have been held an improper subject of consideration in analyzing requests to reduce the level of treatment required. See Crown Simpson Pulp Co. v. Castle, 642 F.2d 323 (9th Cir. 1981); Appalachian Power v. EPA, 671 F.2d 801 (4th Cir. 1982).

XV

This brings us to subissue (2)--the relevance of grant availability. As with water quality, the non-availability of grant assistance has been held irrelevant to the substantive duty to meet specified levels of treatment under the federal act, except where

considerations of existing water quality, but not of the effects of proposed discharges in the process of technology selection. To look at water quality effects without looking at existing water quality would be virtually impossible. Moveover, such a reading would, in practice, make water quality the driving force in choosing the levels of treatment to be achieved. This is precisely the opposite of what the legislative evolution of the State Standard points to. It is an interpretation undercutting the whole concept of a technology-based system and would render illusory the attempts to make state law conform to the 1972 federal act. We decline to adopt it.

XIII

The State Act requires that a waste discharge permit be obtained before wastes are discharged into the waters of the state. RCW 90.48.160, 90.48.162.

RCW 90.48.180 provides, in pertinent part:

> the [DOE] shall issue a permit unless it finds that the disposal of waste material as proposed in the application will pollute the waters of the state in violation of the public policy declared in RCW 90.48.010. The [DOE] shall have authority to specify conditions necessary to avoid such pollution in each permit under which waste material may be disposed of by the permittee:

Water quality standards represent the determination of DOE as to what constitutes pollution. Centralia v. DOE, PCHB No. 84-287 (1985); RCW 90.48.040, 90.48.035. Thus, no waste discharge permit may be issued at all if the disposal of wastes as proposed would violate water quality standards.

exception to the technology-based State Standard.

X

We conclude that the State Standard as expressed in currently effective legislation calls for the imposition of methods of treatment based on technology and that, in the instant case, water quality considerations are irrelevant to the selection of the technology to be imposed.

We need not decide if water quality considerations might be relevant under state law where the discharge occurs into severely degraded waters or where existing water quality or water quality standards would be exceeded absent extraordinary treatment efforts. None of these is the problem here.

XI

The two most recent formulations of the State Standard, RCW 90.52.040 and RCW 90.54.020(3)(b) are not in conflict. Both passed in the same legislative session and should be construed as in the same spirit and actuated by the same policy. Daviscourt v. Peistrup, 40 Wn. App. 43, ____ P.2d ____, (1985).

RCW 90.54.020(3)(b) supplements the State Standard with a non-degradation policy which arguably could require more stringent technology than ordinarily necessitated by the Standard. Where, as here, degradation is not threatened, the subsection does not make water quality relevant to the choice of technological alternatives.

XII

We reject the notion that RCW 90.52.040 rules out only

> of and is compatible with the requirements of any national permit system.

The State Standard, thus, is meant to be at least as stringent as the federal requirements.

IX

The "marine waiver" provisions of Section 301(h) of the federal statute [33 USC 1311(h)], adopted four years later in 1977, have no state law analogue. Though the state law was consciously altered in 1973 to insure that it was at least as stringent as the 1972 version of the federal statute, it has never subsequently been amended to mirror the 1977 weakening of the federal scheme for marine discharges by municipalities.

Section 510 of the Federal Act, 33 USC 1370, authorizes states to enforce standards which are more stringent than those imposed federally. The federal scheme does not require states to weaken their standards when the federal government weakens its standards and our Legislature has not done so.

Nothing in the state laws distinguishes between the treatment of discharges to salt water and other discharges. Nothing suggests a separate standard to be applied to municipalities as opposed to commercial and industrial operations.

Section 301(h) of the federal act does not impose new requirements for states administering the federal act. It creates an optional procedure which states may choose to reflect in state law or not. The State of Washington has not chosen to adopt a "marine waiver"

state law, see Bellingham v. DOE, PCHB No. 84-211, June 19, 1985.

VII

The state permit system (initially limited to commercial and industrial operations) was extended to municipalities or public corporations operating sewer systems in 1972. Section 1, chapter 140, Laws of 1972 ex. sess. In adding these entities to the system, the Legislature stated:

> ...this section is intended to extend the permit system of RCW 90.48.160 to counties and municipal or public corporations and the provisions of...RCW 90.52.040 shall be applicable to the permit requirements of this section. RCW 90.48.162. (Emphasis added.)

Explicitly, then, a version of the State Standard which calls for disregarding water quality was incorporated into chapter 90.48 RCW and made to apply to the newly covered class of permittees.

VIII

The 1973 state-law amendments giving DOE all powers necessary to administer the NPDES program, underscored that the State Standard is a technology-based treatment provision. The federal standards now to be implemented by the state, then called expressly for all municipalities to meet effluent limitations based on secondary treatment, Section 301(b)1(B).

RCW 90.48.162(1) drives the point home forcefully:

> ...The permit program authorized under RCW 90.48.260(1) shall constitute a continuation of the established permit program of RCW 90.48.160 and other applicable sections within chapter 90.48 RCW. The appropriate modifications as authorized in this 1973 amendatory act are designed...to insure that the state permit program contains all required elements

construction programs in furtherance of water pollution control.

While the matter here has caused each of the actors to shift attention often between federal and state entities this appeal involves state law only. No distinct federal law issues are raised. There is one encompassing question: Can the City of Port Angeles be permitted to continue discharging wastes provided with less than secondary sewage treatment?

This question requires interpretation of the statutory formulation "all known, available, and reasonable methods of treatment" (the State Standard). No one here argues that secondary treatment is either unknown or unavailable. The dispute is over its reasonableness.

V

The broad question here in this appeal divides into three subissues:

(1) May water quality be considered in determining what the State Standard requires?

(2) Is the reasonableness of a treatment method affected, as a matter of law, by the availability of federal or state grant funds (financial aid) to help pay for its installation?

(3) If the answer to these two subissues is negative, is it reasonable to require Port Angeles to achieve at least secondary treatment?

VI

The water quality subissue is the source of greatest disagreement. For a discussion of the historical evolution of the

The meaning of these sections is at the heart of this case. From their plain language, the apparent purpose was to establish unambiguously a technology-based system in this state.

III

Public Law 92-500 was enacted in 1972, the year following the quoted state enactments. 33 US 1251 et sec. As noted, that statute also created an effluent-control-centered scheme. The key implementing mechanism was the NPDES permit system of Section 402.

The Washington Legislature responded in 1973 by granting DOE general powers to participate in the federal program and providing a detailed grant of power to issue permits satisfying requirements of the federal permit system. The amendment stated, in part:

> ...the powers granted herein include...[c]omplete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system... RCW 90.48.260.

IV

The federal government delegated the implementation of its permit program to the state and specifically to the charge of the DOE. The DOE, thus, has the major role in implementing both the state and federal water pollution control laws.

This delegation and partnership, having matured over a thirteen-year period, finds the state and federal agencies cooperating, but each involved in discrete applications of their own laws in ultimately implementing financial, maintenance, and

Chapters 43.21B, 43.21C, and 90.48 RCW. The DOE denial of a marine waiver is an agency decision appealable to the Pollution Control Hearings Board.

II

The State of Washington adopted the effluent control approach to water pollution management before the federal government did. Two state enactments in 1971 definitively defined the standard for treatment to be implemented through the programs of chapter 90.48 RCW, the State Water Pollution Control Act. These are now codified as RCW 90.52.040 and RCW 90.54.020(3)(b).

The first reads:

> In the administration of the provisions of chapter 90.48 RCW, the director of the department of ecology shall, regardless of the quality of the water of the state to which wastes are discharged or proposed for discharge, and regardless of the minimum water quality standards established by the director for said waters, require wastes to be provided with all known, available, and reasonable methods of treatment prior to their discharge or entry into waters of the state. RCW 90.52.040.

The second reads:

> Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters should not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest would be served. RCW 90.54.020(3)(b).

additional pollutant removal. Beyond this, because of the conclusion set forth below in Conclusion of Law X, the Board did not consider any of the water quality evidence presented in reaching its decision.

XVIII

Port Angeles also argued that the need to install and use significant additional power at their treatment works, if an upgrade to secondary treatment were effected, would not be of environmental benefit. They additionally asserted the management and disposal of sludge would be a problem and additional land usage and hauling activities would not be environmentally sound.

DOE did not prepare an environmental impact statement, nor did it prepare a declaration of negative significance in connection with its determination of June 12, 1984.

XIX

On July 10, 1984, the Board received an appeal of DOE's waiver non-concurrence from Port Angeles and entered it as cause number PCHB 84-178. A hearing was scheduled, then continued at the request of the parties. Finally, the matter was heard in February of this year.

XVI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters.

to make construction of the Port Angeles upgrade signficantly different in cost from such projects as other locales.

Nothing about the salt water location was shown to make achieving secondary treatment more costly than achieving the same pollutant reduction at a fresh water location.

XV

The potential dramatic effect of the secondary treatment project on user charges is not attributable to the imposition of a technology which is unusual or hard to get, or which has been shown from a comparative standpoint to be extraordinarily expensive. The effect is primarily attributable to the assumption, by all concerned, that no grant funds will be available to reduce the amount of cost born locally.

XVI

The City did not prove that it would be beyond its capability to finance the proposed secondary treatment project at this time.

XVII

Evidence concerning the water quality impacts of discharges from both the City's present sewage treatment plant and the proposed upgraded facility was offered at the hearing, objected to, and received subject to a later ruling on its admissibility.

We have admitted this testimony for the limited purpose of determining that the existing quality of the receiving waters is better than the limits described by applicable water quality standards [Class A (Excellent)], and that secondary treatment would result in

costs and bond interest rates applicable to the implementation of its 1978 plan and came up with a much higher user fee figure ($29.89 per month) in 1984 dollars, which was presented at the formal hearing. The Citys rate impact estimate is roughly comparable to the figure to be derived from using EPA's high cost index. Port Angeles asserted the costs to the City and its rate payers would make implementation of secondary sewage treatment unreasonable. It believes its unemployment rate and the low income of many residents to be significant and asserts that floating revenue bonds would be difficult.

XIII

The Port Angeles facility plan evidences that the technology proposed for secondary treatment at the City's treatment plant is neither experimental nor exotic. Further, nothing in the record demonstrates that as a generic category secondary treatment involves prohibitive costs. Indeed, in Port Angeles, two secondary plants discharging substantially larger volumes than the City's have been constructed and are in operation (ITT Rayonier and Crown Zellerbach).

XIV

The particular system type proposed for the City does not appear to be an unusually expensive means for achieving effluent limitations based on secondary treatment. The estimated cost of the land disposal alternative discussed in the facility plan exceeds the estimated cost of the activated sludge system recommended by more than 15 percent. Some land acquisition would be necessary to construct the recommended system, but no site-specific factors would add costs so significant as

The DOE's decision was based, in part, on an Attorney General's Opinion sought by the agency and received in November of 1983. DOE had asked whether it could concur with issuance of a 301(h) waiver under the strictures of state law. The Attorney General's Opinion indicated the need for case-by-case review of applications analyzing whether the level of treatment proposed conforms to the formula "all known, available and reasonable" methods.

XI

DOE did no independent study of the Port Angeles situation, but relied on data readily available, principally that contained in the 1978 facilities plan. No issue is raised here as to whether secondary treatment is "known" or "available." The case has been focused on the "reasonableness" of requiring it at the particular site.

XII

As to reasonableness, the last of DOE's three criteria--economic factors--is most seriously questioned. In this regard the agency looked primarily at approximate project costs and the likely effect of these on user rates, assuming no grant funds would be available. The DOE asserted users would have monthly sewer bills of $19.68 per household based on 1984 dollar values which would be comparable to user charges for other municipalities around the state and would be below the EPA's high cost index, a guideline published to assist evaluators to judge whether projected sewer rates are approaching unacceptably high levels in light of median family income. The City engaged its own staff and outside experts to project construction

a waiver request. If the EPA decided tentatively to favor granting a marine waiver to a municipality then the application was passed over to the state, who was to have up to a year to see whether the application met the requirements of state law.

IX

In 1983, the EPA procedures changed and states were required to first review any such application. Recognizing that any particular state's disclosure that an application fails to meet state law effectively ends the process, it was decided that states should first do their review in cases where final determinations had not yet been made. In the spring of 1984 EPA gave the state of Washington a 90-day deadline in which to complete its review and report back.

X

By letter, dated June 12, 1984, Washington State, through its Department of Ecology, advised Port Angeles that it was unable to "provide a determination that the proposed discharge will comply with applicable provisions of state law." DOE took the position that state law requires all known, available, and reasonable treatment methods regardless of the quality of the waters to which wastes are discharged and that secondary treatment of sewage is both known and available and is normally reasonable unless compelling evidence to the contrary is presented. Reasonableness was determined on three criteria: the current state of planning and scheduling for construction; the existence of genuine environmental or siting constraints; and economic factors (including roughly estimated impact on rate payers.)

facility planning with system evaluation and design for upgrade.

The facility plan was completed in September of 1978, and concluded, among other things that:

> Secondary treatment requirements can be most reliably and cost-effectively achieved by using the activated sludge process. The total estimated cost for upgrading treatment is $6,300,000 assuming construction in 1984. Current Federal and state grant funding programs would pay approximately 90 percent of this cost. When the project is implemented it will result in an approximate increase in household monthly sewer service charges of $2.10 ($1.50 per month expressed in 1978 costs).

This cost estimate was an order-of-magnitude estimate stated by the report to be "accurate within +50 percent of -30 percent in today's rapidly rising market."

While officials of Port Angeles were taken with the challenge of addressing and solving the very real problems of inflow and infiltration and control of industrial wastes, as outlined in the facilities planning reports, they were less enamored of the requirement to upgrade the plant itself from primary to secondary treatment capability and, after passage of Section 301(h) in 1977, began to contemplate applying for a marine waiver. They submitted their first application for such a waiver in September of 1979 with the assistance of the same experienced engineering consulting firm. EPA reviewed the application and asked the City for additional information and, consequently, supplements to the original application were filed in 1983 and 1984. At the time of the initial application, EPA regulations required that EPA review precede the state's review of

federal government authorized a sizeable program of grants-in-aid for construction of appropriate municipal treatment works. For ten years, plants across the nation were upgraded with federal aid funding 75 percent of the cost. In Washington State, additional grant-in-aid funds from state sources supplied an additional 15 percent of project costs, leaving only 10 percent to be funded from local sources in typical cases.

In the past few years, the plentiful grant-in-aid funds have become scarce. Only a few treatment plant projects each year now can expect to receive such funds. Municipalities are asked to continue to plan for and implement upgraded technology treatment on the basis that all, or nearly all, of the cost of improvements will have to be borne locally.

Municipalities which do not qualify for a marine waiver under terms of Section 301(h) of the federal Clean Water Act must continue to improve their systems and plants and implement secondary treatment of sewage. The deadline for reaching at least secondary treatment capability was initially 1977, then extended to mid-1983, and then extended again to mid-1988. Under the federal program, the substantive obligation to upgrade treatment capability remains regardless of the receipt of grant(s)-in-aid.

VIII

In late 1975, city officials began thinking about upgrading their sewerage facility, system-wide, and with 1976-77 grant-in-aid funds, contracted with an experienced engineering consulting firm to do

VI

Amendments to the Federal Act eight years ago did make provisions, at section 301(h), for waivers of the secondary treatment technology requirement for certain qualifying municipalities discharging to marine waters. The waiver was to take the form of an NPDES permit issued directly by the United States Environmental Protection Agency (EPA) to the municipality if numerous statutory tests were passed, including test criteria related to the quality of the receiving waters.

However, 301(h) allows EPA-issued waivers only with the concurrence of the state in which the discharge occurs. By federal rule, EPA provided that:

> No Section 301(h) modified permit shall be issued
>
> . . .
>
> (3) where such issuance would conflict with applicable provisions of State, local, or other federal laws or Executive Orders.

45 CFR 125.59(b)(3).

Further, the EPA made the states themselves the judges of when issuance of a marine waiver would conflict with the state law. Under terms of 42 CFR 125.60(b)(2), each applicant must provide a so-called "determination," signed by the appropriate state agency, that the proposed modified discharge will comply with applicable provisions of state law. If a state does not provide such a determination, the federal waiver process ceases. 40 CFR 125.59(e)(3).

VII

To assist in implementing required treatment technology, the

program based on the effluent control approach. This approach is premised on the understanding that, most often, the pollutant removal achieved by one or more individual dischargers (e.g., industries, business complexes, municipalities) will result in water quality which is better than the limits described by water quality standards. In such situations, there is room for other dischargers (point source and non-point source) to use the same receiving medium without the occurrence of pollution, as it is presently defined. Assuming that knowledge of the effects of adding society's wastes to water is now imperfect, technology-based limits on effluent provide a hedge against unknown long-term adverse consequences of discharges which are not accounted for in present water quality standards.

V

Through the DOE, the state of Washington has lawfully undertaken the administration of the Public Law 92-500 National Pollutant Discharge Elimination System (NPDES) permits within its borders and it merges those permits with waste discharge permits authorized under state law alone. For publicly owned treatment works, such permits normally are drawn to require dischargers to achieve effluent limitations based on at least secondary treatment technology at the point of discharge. Water quality standards come into play when generally applicable effluent limitations are not stringent enough to achieve standards. In such circumstances tougher effluent limitations are imposed by permit.

months of the year.

II

Respondent DOE is an agency of the state of Washington, with responsibilities for administering the water pollution prevention and control laws of the state, including their applicability to operation of publicly owned treatment works and the effluent quality of flows therefrom.

III

The City is one of several municipalities located on marine waters which dispute the policy view of the state on upgrading of sewage treatment plants to a level within the reasonable reach of recognized technology. It asserts a lesser level of pollutant removal should be tolerated based on an estimated threshold of harm to the biology, uses of the receiving water, and economic impact to Port Angeles ratepayers.

Succinctly stated, the DOE wants the City to upgrade its municipal plant to secondary sewage treatment. The City does not want to do that.

IV

As noted in narrative legislative history at the federal and state level, in technical literature, and in a prior Board opinion, City of Bellingham v. DOE, PCHB No. 84-211, there is a long history of dueling theories of water quality regulation which pits management based on receiving water quality against management based on control of effluent at the point of discharge.

Public Law 92-500, enacted in 1972, established a nation-wide

represented by Leslie Nellermoe, Assistant Attorney General.

Following the hearing, post-hearing briefs and argument were filed and reviewed by the Board as part of the appeal record.

In the evidentiary hearing, witnesses were sworn and testified and exhibits were admitted and examined. From the testimony, evidence, and contentions of the parties, the Board makes these

FINDINGS OF FACT

I

Appellant City is a municipal corporation which owns and operates a sewage treatment plant sitting on 8.67 acres on the shores of Port Angeles Harbor and the Strait of Juan de Fuca. The plant, whose peak design capacity is ten million gallons per day, was put into service in 1969 and currently provides only primary treatment in serving homes and businesses. The discharge outfall for the plant is located in approximately 60 feet of water at a northeast angle, generally well located for effluent flow and flushing. Under ordinance, the City now has an industrial waste-wastewater pretreatment program and nearby major industrial plants treat their own sewage waste with advanced treatment methods.

As noted in City reports, the sewage collection system is 70 percent separated into sanitary and storm sewers and 30 percent combined; there being seven shoreline overflow points in which combined raw sewage and storm water, stimulated by in-flow, overflows into Port Angeles Harbor. Infiltration affects over 20 percent of the sewer collection system and most impacts the system during the wettest

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CITY OF PORT ANGELES, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 84-178 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of the Department of Ecology's refusal to concur in the City of Port Angeles' application for a waiver from the requirement to achieve effluent limitations based on secondary treatment at its municipal sewage treatment plant, came on for hearing in Port Angeles, Washington, on February 4 and 5, 1985. Sitting for and as the Board were Lawrence J. Faulk, Wick Dufford, and Gayle Rothrock. Ms. Rothrock presided.

Appellant City of Port Angeles (City) was represented by Craig D. Knutson, City Attorney. Respondent Department of Ecology (DOE) was